Tentative Rulings for April 28, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

16CECG00268 ***Long v. Calantropio*** **(Dept. 502)**

14CECG03430 ***Granite State Insurance Company v. Barry Halajian, et al.*** **(Dept. 501)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

10CECG03800 ***Torigian v. Shmavonian et al.*** **is continued to Thursday, May 12, 2016, at 3:30 p.m. in Dept. 502.**

11CECG04395 ***Switzer v. Flournoy Management, LLC*****, is continued to Thursday, May 5, 2016, at 3:30 p.m. in Dept. 501.**

14CECG02185 ***Van Kim Nguyen v. Hieu Luong*** **has been continued to Tuesday, May 3, 2016, at 3:30 p.m. in Dept. 402.**

16CECG00912 ***In Re 1666 Hampton Way, Clovis, Ca. 93611*** **is continued to Thursday May 5, 2016, at 3:30 p.m. in Dept. 403.**

13CECG03138 ***Woods v. Central Valley Real Estate, Inc.*** **is continued to Tuesday, May 3, 2016, at 3:30 p.m. in Dept. 502.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20) **Tentative Ruling**

Re: ***Modahl v. Kitchin***, Superior Court Case No. 14CECG02566

Hearing Date: **April 28, 2016 (Dept. 402)**

Motion: Defendant's Motion to Compel Plaintiff's Deposition

Tentative Ruling:

To order plaintiff to appear for her deposition at 10:00 a.m. on May 10 and 11, 2016, at defense counsel's office. To deny defendant's request for sanctions.

Explanation:

Defendant has diligently sought to obtain dates on which to take plaintiff's deposition, but plaintiff has not cooperated in scheduling the deposition. It is apparent that unilaterally noticing a deposition would have been a futile act. Plaintiff must comply with the Civil Discovery Act and submit to a deposition. Plaintiff will be ordered to appear for her deposition on the date, time and location requested in the moving papers, unless the parties agree on a different date and/or location.

Sanctions will be denied because there has not yet been a failure to appear under Code Civ. Proc. § 2025.450(a).

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 4/27/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

03

Tentative Ruling

Re: ***Padron v. Moreno***
Case No. 15 CE CG 03521

Hearing Date: April 28th, 2016 (Dept. 403)

Motion: Defendants' Anti-SLAPP Motion to Strike

Tentative Ruling:

To grant defendants' special motion to strike the plaintiff's entire complaint as to all defendants, without leave to amend. (Code of Civ. Proc. § 425.16.) Defendants shall submit a proposed judgment for the court's signature dismissing the entire action with prejudice, within 10 days of the date of this order.

Explanation:

Under Code of Civil Procedure section 425.16, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc. § 425.16(b)(1).)

"The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing." (Code Civ. Proc., § 425.16, subd. (f).)

"As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16(e).)

"The latter two categories require a specific showing the action concerns a matter of public interest; the first two categories do not require this showing. [Citation.]" (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 474.)

"In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc. § 425.16(b)(2).)

"Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67.)

"Once we determine that the anti-SLAPP statute applies, the burden then shifts to the plaintiff to demonstrate a probability of prevailing. [Citation.] If the plaintiff does so, the motion to strike under the anti-SLAPP statute must be denied. To establish the requisite probability of prevailing, the plaintiff must state and substantiate a legally sufficient claim. [Citation.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citation.]" (*Navarro v. IHOP Properties, Inc*. (2005) 134 Cal.App.4th 834, 843.)

"Only a cause of action that satisfies both prongs of the anti-SLAPP statute-i.e., that arises from protected speech or petitioning and lacks even minimal merit-is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

Here, first of all, the motion to strike has been filed more than 60 days after the complaint was served on defendants. Defendants were served on November 17th, 2015, and the motion was not filed until March 10th, 2016, almost four months later. Thus, defendants have not complied with section 425.16, subd. (f). However, the defendants could not have filed the motion during the period in which they were in default. The defendants' defaults were entered on December 18th, 2015 and were not set aside until March 1st, 2016. Therefore, while the motion to strike was not filed within 60 days of the service of the complaint, the motion was brought promptly after the defendants' defaults were set aside, and the court intends to exercise its discretion to hear the motion.

Next, with regard to the merits of the motion, defendants have met their burden of showing that their allegedly defamatory statements were protected activities under

section 425.16. The defendants contend that Moreno's comments were oral and written statements made before a legislative proceeding, or were made in connection with an issue under consideration or review by a legislative body. (Code Civ. Proc. § 425.16, subd. (e)(1), (2).) However, defendants cite to no authority that would support the proposition that the Board qualifies as a "legislative body" for purposes of section 425.16. It does not appear that the Board acts as a legislative body by performing tasks such as enacting laws or creating public policy. Nevertheless, the Board meeting does appear to qualify as an "official proceeding authorized by law" under section 425.16, subd.'s (e)(1) and (2), since school board meetings are authorized by statute. (Education Code § 35140.)

The complaint clearly alleges that the oral comments by Moreno were made during a public meeting of the Parlier Unified School District Board on October 13th, 2015 [*sic*, October 27th, 2015]. (Complaint, ¶¶ 12, 13.) Allegedly, she stated during the meeting that "I find it DISGUSTING that a grown man would feel the need to rob an innocent three-year old child of his right and go so far as to take a public forum and announce that he has a disability." (*Id*. at ¶ 13.) Moreno also repeated her comments in writing on a social media forum the next day. (*Id*. at ¶ 15.) Lucero also made his own written comments on social media in response to Moreno's statements, making the statements "Dr. Bully" and "Once a Bully Always a Bully." (*Id*. at ¶ 16.)

Another person made hostile comments about plaintiff in response to Moreno's statement, stating "WHAT A PIECE OF SHIT ALFONSO." "IF YOU WANT CUZ LET ME KNOW AND I'LL TALK TO HIM!!! JUST SAYING." "LET ME KNOW WHEN YOU HAVE THE NEXT MEETING I'LL B THERE!!!!!!" Someone else wrote "Shame on Alfonso Padron." (*Id*. at ¶ 17.)

Moreno states in her declaration that these statements and comments were made in response to plaintiff's prior statements at a Board meeting on September 22nd, 2015, in which plaintiff publicly announced that Moreno had a special education child. (Moreno decl., p. 1.) The September 22nd meeting discussed a number of issues, including special education and a proposal to obtain special education services from an individual who had a waiver from certain certification requirements. (*Ibid*.) The issue of special education is a frequent and ongoing concern of the Board. (*Id*. at p. 2.) Moreno claims that she was responding to plaintiff's comments made in the September 22nd meeting when she made her comments during the October 27th meeting and her subsequent comments on Facebook. (*Ibid*.) She was particularly upset because she had not yet made public the fact that she had a son with autism at the time plaintiff revealed that she had a disabled child. (*Id*. at p. 1.)

Thus, the allegations of the complaint and the evidence submitted by defendants show that the defendants' comments were made either during the course of an official proceeding authorized by law, or were made in connection with an issue under consideration in an official proceeding. The Board was authorized by law to hold meetings regarding education issues. The meetings on September 22nd and October 27th, 2015 were convened to consider, among other things, issues regarding special education and whether uncertified people should be given waivers to be employed in special education in the District. Plaintiff's comments about Moreno's child were made

directly in connection with the special education issue, since he alleges in his complaint that he pointed out that Moreno had a child with a disability as part of his objections to giving waivers to people who were going to work in special education. (Complaint, ¶ 11.)

While plaintiff contends that the October 27th meeting was not called to consider special education issues and thus Moreno's comments were not made in connection with this issue, he offers no evidence to support his contention. Indeed, the minutes of the meeting submitted by plaintiff in opposition to the motion show that plaintiff himself continued to speak about special education issues at the October 27th meeting. (Exhibit F to Opposition, p. 8.) Therefore, it appears that the issue of special education was still under consideration by the Board at the October 27th meeting, and the alleged comments of Moreno during the meeting fall under the definition of statements made during an official proceeding, or in connection with an issue under consideration in an official proceeding authorized by law.

The subsequent comments on Facebook by Moreno and Lucero also fall within the definition of section 425.16, subd. (e)(2), since they were made in connection with an issue under consideration in an official proceeding authorized by law. Moreno's Facebook comment recited verbatim her statement before the Board on October 27th, and then added further comments about her feelings regarding having her son's disability exposed in public. (Exhibits A and D to Complaint.) Lucero then made his comments about plaintiff being a "bully." (Exhibits C and E to Complaint.) These comments were all made in connection with the issue under consideration by the Board, namely the question of whether waivers should be granted to people working in special education in the District. (Lucero decl., p. 1, Moreno decl., pp. 1-2.) Thus, the statements fall within section 425.16, subd. (e)(2).

Also, even assuming that the Facebook statements were not made directly in connection with the issue under consideration by the Board, they would fall under section 425.16, subd. (e)(3) as statements made in a place open to the public or a public forum in connection with an issue of public interest. "'Under its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication.'" (*Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1075, 1086, internal citations omitted.)

Statements made in Internet message boards and social media are generally considered to be made in a "public forum" for purposes of section 425.16, subd. (e)(3).) "[W]e have little difficulty concluding Wendy's statements were made in a public forum. Like the court in *Wilbanks*, we view the Internet as an electronic bulletin board open to literally billions of people all over the world. The Internet is a classic public forum which permits an exchange of views in public about everything from the great issues of war, peace, and economic development to the relative quality of the chicken pot pies served at competing family restaurants in a single small neighborhood." (*Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1146, internal citations omitted.)

Here, the statements by Moreno and Lucero were made on Facebook, one of the most popular and widely-viewed sites on the Internet. Facebook postings are

frequently read by many people and are viewable by the public at large, and are subject to responses and commentary. Indeed, this is exactly what happened here, and in fact it is one of the bases for plaintiff's complaint, since Moreno's comments led to several negative responses by other people. Thus, it seems clear that Moreno's and Lucero's comments were made in a public forum.

Their comments also concerned issues of public interest, since they concerned the treatment of autistic and disabled children, as well as the administration of special education for such children. While Moreno's comments were largely an emotional reaction to plaintiff's comments about her son, she also noted that "I would suggest that people be careful in the comments they make because let me remind you like I said previously 1 in 68 children are born with autism so you never know if and when it may appear in your family." (Exhibit D to Complaint.) Thus, it appears that Moreno's comments were intended, in part, to be a statement about the treatment of disabled and autistic children in general, and not just her specific child. Such issues are of general interest to the public at large, and therefore fall within the protection of section 425.16, subd. (e)(3).

As a result, the court intends to find that defendants have met their burden of showing that their statements were protected, and the burden then shifts to plaintiff to prove by admissible evidence that he has a probability of prevailing on his claims. (Code Civ. Proc. § 425.16, subd. (b)(1).) However, plaintiff has failed to meet his burden.

First of all, Moreno's statements during the October 27th meeting are absolutely privileged under Civil Code section 47, subd. (b). Section 47, subd. (b) states, "A privileged publication or broadcast is one made: ... in any other official proceeding authorized by law…" (Civ. Code, § 47, subd. (b)(3).) Here, as discussed above, the Board meeting during which Moreno made her statements about plaintiff was an official proceeding authorized by law, and thus the statements that she made during the meeting were absolutely privileged, and plaintiff cannot state a claim based on her statements even if they were made with malice. (*Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 500: statements made by public official during the discharge of his or her official duties is absolutely privileged.)

Moreno's subsequent statements on Facebook regarding plaintiff's comments about her disabled son were also directly related to her statements during the meeting, and thus they were privileged as well. (See *Cayley v. Nunn* (1987) 190 Cal.App.3d 300, 303-304: statements logically connected to the litigation and made to achieve the objects of litigation are also covered by the litigation privilege, even if they are made outside the courtroom or before litigation has commenced.) Again, Moreno's social media comments essentially reiterated and amplified on her statements to the Board during the October 27th, 2015 meeting.

Lucero's comments in response to Moreno's statements are also directly related to the meetings held on September 22nd and October 27th, and thus they are privileged as well. Since the comments by both defendants are absolutely privileged, there is no way that plaintiff can prevail on his claims against them. (*Silberg v. Anderson* (1990) 50

Cal.3d 205, 212: Civil Code section 47 immunity applies to all torts except for malicious prosecution.)

Moreover, even if the privilege under section 47 does not apply, plaintiff still has failed to show that he has any probability of prevailing on his claims. Plaintiff's first cause of action is for intentional infliction of emotional distress. However, in order to prevail on this claim, plaintiff needs to prove that defendants acted in an extreme and outrageous manner when they made their comments, that they intended to cause, or acted with reckless disregard for causing, plaintiff emotional distress, and that plaintiff suffered severe emotional distress as a result. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminister* (1982) 32 Cal.3d 197, 209.) Ordinarily, mere insults, indignities, threats, annoyances, petty oppressions, and other trivialities are not enough to support a claim for IIED. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946, disapproved on other grounds by *White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 574, fn. 4.)

Here, the statements of Moreno and Lucero do not rise to the level of extreme and outrageous conduct that exceeds all bounds of that usually tolerated by a civilized community. At most, Moreno expressed her dismay that plaintiff had revealed in public that her child was disabled. Moreno used some fairly strong language in her comments, including accusing plaintiff of "stoop[ing] so low and target[ing] my innocent child", and stating that she "find[s] it DISGUSTING that a grown man would feel the need to rob an innocent three-year old child of his rights and go so far as to take a public forum and announce that he has a disability!" (Exhibit A and D to Complaint.) However, none of these comments went beyond the scope of the kind of conduct usually tolerated in a civilized community. They were, at most, the kinds of insults, annoyances and trivialities that cannot support an intentional infliction of emotional distress claim.

Likewise, Lucero's comments boiled down to calling plaintiff a "bully", which is nothing more than an insult. Certainly, calling someone a bully in an Internet forum, while rude and insulting, is not an uncommon or unacceptable act that warrants imposing money damages for intentional infliction of emotional distress. Therefore, it does not appear that plaintiff has any probability of prevailing on his claim for IIED.[1]

Similarly, there is no probability that plaintiff will prevail on his second cause of action for defamation of character. First, as discussed above, the statements were privileged under Civil Code section 47, so they cannot form the basis for a defamation or slander claim. (Civil Code § 46: "Slander is a false and **unprivileged** publication, orally uttered, and also communications by radio or any mechanical or other means…" Emphasis added.)

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[1] Pelayo is also named as a defendant in the first cause of action, but he is not accused of making any statements or doing anything other than "condoning" the acts of Moreno and Lucero. (Complaint, ¶ 20.) Since Moreno's and Lucero's comments are not extreme or outrageous conduct, Pelayo cannot be held liable for merely condoning them.

Second, plaintiff voluntarily injected himself into a public controversy, so he is a limited public figure for the purposes of a defamation claim. (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577.) "*Copp v. Paxton* sets forth the elements that must be present in order to characterize a plaintiff as a limited purpose public figure. First, there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants. Second, the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue. In this regard it is sufficient that the plaintiff attempts to thrust him or herself into the public eye. And finally, the alleged defamation must be germane to the plaintiff's participation in the controversy." (*Ibid*, internal citation omitted.)

Here, plaintiff meets all of the elements for a limited public figure. There was a public controversy over the use of waivers for special education positions that was debated at the School Board meetings, and that had substantial ramifications for nonparticipants, including students and their parents. Second, plaintiff voluntarily injected himself into the controversy by making public comments at the September 22nd, 2015 meeting, as well as the October 27th meeting regarding special education waivers. Finally, the allegedly defamatory statements were relevant to plaintiff's participation in the controversy, since Moreno and Lucero responded to plaintiff's comments regarding Moreno's child, which were made in the context of the special education debate. Therefore, plaintiff is a limited public figure, and he must prove that Moreno and Lucero's comments were made with knowledge of falsity, or with reckless disregard for the truth. (*Ampex, supra*, at 1577.)

Yet plaintiff has not offered any evidence to show that Moreno's comments about him were false, much less that they were made with knowledge of falsity or reckless disregard for the truth. Indeed, plaintiff admits that he made the comments about Moreno's child to which she responded during the October 27th meeting. (Complaint, ¶ 11.) Plaintiff contends that Moreno falsely accused him of making her child's disability public when Lucero had already disclosed the child's disability at a prior meeting with parents. (*Id*. at ¶ 9, Mora decl., p. 2.) However, plaintiff does not allege that Moreno was aware of the alleged fact that Lucero had disclosed that she had a child with a disability when she made her statement on October 27th. Also, plaintiff does not allege whether Lucero's prior disclosure was made in confidence, or was a general disclosure to the public. He only alleges that it was made at a meeting with "concerned parents" in June of 2015. (Complaint, ¶ 11.) If the disclosure was to a limited number of people and was not intended to be shared with the general public, then Moreno may have honestly and reasonably believed that her son's disability was not a matter of public knowledge. Moreno herself states that she had not made her child's disability publicly known at the time plaintiff disclosed it at the September 22nd meeting. (Moreno decl., p. 1.) Therefore, Moreno's statement that plaintiff disclosed her child's disability in public was not false, or at least was not made with knowledge of falsity or reckless disregard for the truth.

Plaintiff also denies that he ever "targeted" Moreno's child, "robbed" him of his rights, violated his rights of privacy and confidentiality, targeted Moreno personally, or announced that her child had a disability in violation of his rights. (Moreno decl., p. 2.)

However, most of Moreno's statements were expressions of her opinion rather than statements of fact.

"There can be no recovery for defamation without a falsehood. Thus, to state a defamation claim that survives a First Amendment challenge, plaintiff must present evidence of a statement of fact that is provably false. 'Statements do not imply a provably false factual assertion and thus cannot form the basis of a defamation action if they cannot "'reasonably [be] interpreted as stating actual facts "about an individual." [Citations.] Thus, ''rhetorical hyperbole," "vigorous epithet[s]," "lusty and imaginative expression[s] of ... contempt," and language used "in a loose, figurative sense" have all been accorded constitutional protection. [Citations.]' The dispositive question after the *Milkovich* case is whether a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion." (*Seelig v. Infinity Broadcasting Corp*. (2002) 97 Cal.App.4th 798, 809, internal citations omitted.)

Here, Moreno stated that "**I feel** it was a VIOLATION of both my son and my family's rights to PRIVACY and CONFIDENTIALITY. Lastly, I would like to say **I find** it DISGUSTING that a grown man would feel the need to rob an innocent three-year old child of his rights and go so far as to take a public forum and announce that he has a disability!" (Exhibit D to Complaint, emphasis added.)

The use of phrases such as "I feel" and "I find" in this context indicate that Moreno is expressing her opinions as to plaintiff's conduct, rather than stating concrete facts. Her statements regarding violation of privacy and confidentiality are consistent with her claim, which plaintiff has not rebutted, that plaintiff disclosed private information about her child. Her other statements, while perhaps inflammatory and insulting, appear to be no more than rhetoric and "lusty expressions of contempt." Also, as discussed above, plaintiff does not deny that he made the statement in a public forum declaring that Moreno's son had a disability. Regardless of whether plaintiff takes issue with the way Moreno couched her response, he has admitted the central factual statement in Moreno's statement, namely that he openly discussed her child's disability in public. Therefore, plaintiff cannot prevail on his defamation claim against Moreno.

Likewise, Lucero's comments calling plaintiff "Dr. Bully" and saying "Once a bully always a bully" appear to be nothing more than insults or rhetorical flourishes, rather than expressions of fact. Plaintiff denies that he is a bully. However, there is no way to objectively prove or disprove whether plaintiff is or is not a bully, and thus Lucero's statement is nothing more than an opinion. As such, plaintiff cannot prevail on his defamation claim against Lucero.

Finally, plaintiff has not shown that he has any probability of prevailing on his claims for violations of the Bane and Ralph Acts, Civil Code sections 52.1 and 51.7. Section 52.1 prohibits one person from using threats, intimidation, or coercion with the exercise of another person's constitutional or statutory rights. (Civil Code § 52.1, subd. (a).) However, "Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech,

violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat." (Civ. Code, § 52.1, subd. (j).)

Here, plaintiff has not alleged, and apparently cannot allege, that defendants committed violence or made any threats of violence against him. At most, plaintiff alleges that other persons posted arguably threatening comments on Facebook in response to Moreno's comments. Yet even the comments of the third parties, such as "WHAT A PIECE OF SHIT ALFONSO" and "LET ME KNOW WHEN YOU HAVE THE NEXT MEETING I'LL B THERE!!!!!!" (Complaint, Exhibits B and E), do not make any explicit or obvious threats of violence.

Even assuming that such comments are threatening, they were not made by defendants, and there is nothing in defendants' comments that appears to have incited such threats. Moreno expressed her anger and dismay at the comments made by plaintiff, but did not make any threats or incite any violence toward him. Instead, she cautioned people about making insensitive comments about people with disabled children. (Exhibit D to Complaint.) Lucero called plaintiff a "bully" but did not suggest that he or anyone else should take any specific action, much less violent action, against plaintiff. (Exhibits C and E.) Pelayo is not accused of making any comments at all on the issue, so he cannot be held liable for any threats of violence. Therefore, there is no way that plaintiff can prevail on his section 52.1 cause of action.

By the same token, plaintiff has no chance of prevailing on his section 51.7 claim. Section 51.7 states that "All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics." (Civil Code § 51.7.) Civil Code section 51, subdivision (b) forbids discrimination due to sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status. Subdivision (e) defines the terms in subdivision (b) specifically.

Again, plaintiff has not alleged, much less shown by admissible evidence, that he was subjected to violence or threats of violence by defendants for any reason, much less because he had or was believed to have characteristics defined in subdivisions (b) or (e) of section 51. Plaintiff does not accuse defendants of making any direct threats against him. At most, he alleges that they "condoned" or encouraged such actions by others. However, none of the comments made by defendants can be reasonably read to show incitement to commit violence against plaintiff. The negative comments made by third parties appear to have been completely unsolicited, even assuming that they can be read to make threats against plaintiff. Plaintiff fails to point to any evidence in his opposition that would show any threats or incitement to violence by defendants based on his race, ethnicity, religion, or other protected class. Therefore, plaintiff has no probability of prevailing on his claim under section 51.7.

As a result, the court intends to strike the entire complaint as to all defendants, as it is a SLAPP action. (Code Civ. Proc. § 425.16.)

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 4/27/16 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***West Coast Waste, Inc. v. Champagne Landscape Nursery, Inc. et al.***
Court Case No. 15 CECG 01091

Hearing Date: April 28, 2016 (Dept. 403)

Motion: Default Prove Up

Tentative Ruling:

To deny a court judgment.

Explanation:

Required Documents Have Not Been Filed:

A court has discretion to permit use of declarations instead of personal testimony as to all or any part of the evidence or proof required to substantiate a default judgment. (Code Civ. Proc., § 585, subd. (d).) Written applications for default judgment on declarations pursuant to section 585, subdivision (d) are the preferred procedure in Fresno County. (Fresno County Superior Court Local Rules, rule 2.1.14.)

California Rules of Court, rule 3.1800 provides that a party seeking a default judgment on declarations must use mandatory Request for Entry of Default (Application to Enter Default) (Judicial Council form CIV-100). The following documents must be filed with the clerk: (1) Except in unlawful detainer cases, a brief summary of the case identifying the parties and the nature of plaintiff's claim; (2) Declarations or other admissible evidence in support of the judgment requested; (3) Interest computations as necessary; (4) A memorandum of costs and disbursements; (5) A declaration of nonmilitary status for each defendant against whom judgment is sought; (6) A proposed form of judgment; (7) A dismissal of all parties against whom judgment is not sought or an application for separate judgment against specified parties under Code of Civil Procedure section 579, supported by a showing of grounds for each judgment; (8) Exhibits as necessary; and (9) A request for attorney fees if allowed by statute or by the agreement of the parties.

None of these documents have been filed in a reasonable time in advance of the hearing.

No Several Judgment Will Issue:

In an action against several defendants, a judge may enter a default judgment against one or more defendants and allow the action to proceed against the other defendants, if more than one judgment is proper. (Code Civ. Proc., § 579; *Cuevas v. Truline Corp*. (2004) 118 Cal.App.4th 56, 60-61.) A default judgment against one

defendant is improper if several defendants are sued on a joint liability claim and one or more of them asserts defenses that would exonerate the defaulting defendant from that liability. (*Mirabile v. Smith* (1953) 119 Cal.App.2d 685, 689.) In *Mirabile*, one partner had defaulted and another wanted to defend on the grounds "that the debt sued upon had been paid." The appellate court found that the trial court should have been prevented from entering default judgment against the defaulted partner. (*Id*. at p. 690.) *Mirabile* is directly on point as Mr. Champagne has raised the defense that "there is no contract." This would provide a defense to the corporation as well as Mr. Champagne.

Accordingly, the court will decline to enter a several judgment.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 4/27/16 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Whipple v. Community Medical Centers, Inc.***
Superior Court Case No.: 16CECG00382

Hearing Date: April 28, 2016 (**Dept. 403**)

Motion: By Defendant Fresno Community Hospital and Medical Center to compel arbitration and stay action

Tentative Ruling:

To grant, and to stay the action pending completion of the arbitration.

Explanation:

The Federal Arbitration Act ("FAA") favors arbitration. (9 U.S.C. §2; *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.) In determining whether the parties should be compelled to arbitrate, the two questions for the court are: (1) whether a valid agreement to arbitrate exists; and (2) whether the agreement encompasses the dispute at issue. (*Chiron Corp. v. Ortho Diagnostic Systems, Inc.* (9th Cir. 2000) 207 F.3d 1126, 1130.) Here, both questions are answered in the affirmative.

Beginning in 2012, all of Defendant Fresno Community Hospital and Medical Center's ("Defendant") employees were required to review an updated employee handbook and a dispute resolution agreement via a program, the Healthstream Learning Center ("the program"). (Decl. of Carla Milton, ¶¶2, 4, exhibit A.) After viewing these materials through the program, employees were required to electronically confirm receipt of the employee handbook. (Decl. of Carla Milton, ¶5, exhibit B.) Employees were also asked to acknowledge receipt of the dispute resolution agreement to abide by its terms. (Decl. of Carla Milton, ¶6, exhibit B.) Employees affirmatively expressed their acceptance of the terms of the dispute resolution agreement by clicking acknowledgement buttons in the program's module. (Decl. of Carla Milton, ¶7, exhibit B.) Employees were expressly informed of their right to opt-out of the dispute resolution agreement. (Decl. of Carla Milton, ¶8, exhibit B.) The employee handbook and dispute resolution agreement can be accessed by all employees through the program at any time. (Decl. of Carla Milton, ¶9.) Employees may print copies of the employee handbook and dispute resolution agreement if desired. (Decl. of Carla Milton, ¶10.)

After an employee clicks the "confirm" button to confirm receipt of the employee handbook and acceptance of the dispute resolution agreement, an electronic record is created indicating that the employee has "completed" this module in the program. (Decl. of Carla Milton, ¶11.) The electronic record will not show this module in the program as having been "completed" unless the employee has reviewed the policies and clicked the "confirm" button to confirm receipt of the dispute resolution agreement. (Decl. of Carla Milton, ¶11.)

The dispute resolution agreement, specifically governed by the Federal Arbitration Act requires claims such as discrimination, retaliation, and wrongful termination, among others, to be arbitrated, including those related to the interpretation and enforceability of the agreement. (Decl. of Carla Milton, exhibit A at p. 32.) The dispute resolution agreement provides for the appointment of a neutral arbitrator if the parties cannot agree on selection, gives the parties the right to conduct adequate discovery, issue a written decision, and award any remedy to which a party is entitled to under applicable law. Employees are responsible for their own attorney's fees, subject to any fee-shifting, but Defendant will pay the arbitrator's fee. (Decl. of Carla Milton, exhibit A, at p. 32.)

Defendant maintains records for all employees regarding the modules they completed through the program. Plaintiff Katherine Whipple ("Plaintiff") reviewed the employee handbook and dispute resolution agreement on or before August 23, 2012, affirmatively acknowledged receipt of both on that same date, and agreed to abide by the terms of the dispute resolution agreement by clicking the appropriate acknowledgement buttons in the program's module. (Decl. of Esther Castaneda-Wilson, ¶11-12.) Defendant maintains records for all employees who opted out of the dispute resolution agreement, and its records show that Plaintiff did not opt out. (Decl. of Carla Milton, ¶¶12-13.)

Unlike the conclusory declarations at issue in *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232, Cal.App.4th 836, 840-841, 842, 843-844, which did not establish that the person who electronically signed the agreement actually did so, here, the Defendant has established the process, including how the employees and Plaintiff accessed the employee handbook including the dispute resolution agreement, acknowledged receipt, agreed to the terms, and thereby created the electronic signature sufficient under Civil Code section 1633.9.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 4/27/16 .
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Friant Investors, Inc. v. Kachadoorian***
Case No. 16 CE CG 00302

Hearing Date: April 28th, 2016 (Dept. 403)

Motion: Defendant's Motion to Strike Complaint for Damages and for Sanctions Per CCP § 128.5

Tentative Ruling:

To deny defendant's motion to strike the complaint. (Code Civ. Proc. §§ 435, 436.) To deny the request for sanctions against plaintiff pursuant to Code of Civil Procedure section 128.5.

Explanation:

Defendant moves to strike the complaint on the ground that it is essentially an improper or sham pleading, and that plaintiff is attempting to circumvent the ruling of Judge Gamoian in the prior limited civil action, in which she denied the plaintiff's motion to reclassify the action. Defendant contends that plaintiff should not be allowed to avoid the court's earlier ruling denying reclassification of the case by simply dismissing the case and refiling it as an unlimited civil action.

Defendant cites to *Ricard v. Grobstein, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157 in support of his position. However, in *Ricard*, the plaintiffs' second action was improperly filed after their claims for fraud, conspiracy and punitive damages had already been stricken and dismissed as unsupported by facts. (*Id*. at 162.) The second complaint was improper because it was a blatant attempt to circumvent the first court's adverse ruling dismissing those claims, which was essentially a final adjudication on the merits of the causes of action. (*Ibid*.) Plaintiffs were also attempting to split their single cause of action into multiple different cases in different courts as a way to avoid the first court's ruling. (*Ibid*.)

Here, on the other hand, the trial court in the limited civil case never made a ruling on the merits of the plaintiff's claims, and it did not strike or dismiss those claims or sustain a demurrer without leave to amend. Nor was any judgment or involuntary dismissal entered against plaintiff. Judge Gamoian simply found that plaintiff had not met its burden of showing that the case should be reclassified under Code of Civil Procedure section 403.040, subd. (b). (Minute Order of January 11th, 2016 in case no. 15 CE CL 02598. The court intends to take judicial notice of the court's order under Evidence Code section 952, subd. (c).) In other words, Judge Gamoian found that plaintiff had not shown that (1) the case was incorrectly classified, and (2) there was good cause for not seeking reclassification earlier. (Code Civ. Proc., § 403.040, subd. (b).) However, this ruling did not make any findings as to the merits of plaintiff's underlying claims. Unlike in *Ricard*, the plaintiff was not attempting to avoid an earlier

ruling that it could not state a valid claim for relief or denying leave to amend. Nor was plaintiff expressly barred from dismissing the action without prejudice and refiling it in unlimited civil court. Since this is exactly what plaintiff did here, plaintiff's complaint was not improperly filed or a sham pleading.

Indeed, plaintiff has an absolute right to dismiss its claim at any time before trial commences, or before the court hears a demurrer or motion to strike and issues its ruling thereon. (Code Civ. Proc. § 581, subd. (b)(1); *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 912.) Here, the trial had not yet begun when the case was voluntarily dismissed, nor had there been a demurrer or motion to strike or a ruling on such a motion. Therefore, plaintiff was within its rights to dismiss the case voluntarily and without prejudice. Likewise, plaintiff could refile the matter in unlimited civil court.

Defendant also argues that plaintiff is simply attempting to harass him by refiling the matter as an unlimited civil case, and that plaintiff's damages could not be more than the unlimited jurisdictional limit of $25,000 because the entire value of the parcel on which the trees were located is only $20,000. However, defendant offers no evidence to support his assertion as to the value of the parcel. Nor would could the court properly consider such evidence on a motion to strike, since the court is limited to consideration of the allegations of the complaint and judicially noticeable matters. (Code Civ. Proc. § 437, subd. (a).) In any event, if the defendant believes that the plaintiff's damages are less than the jurisdictional amount for an unlimited civil case, defendant can seek relief at by his own reclassification motion. (Code Civ. Proc. § 403.040, subd.'s (b), (f).) However, this would not be a basis for an order striking the entire complaint, but only reclassifying it as a limited civil matter.

Consequently, the court intends to find that the newly filed complaint is not an improper sham pleading, and it intends to deny the motion to strike. In addition, it will deny the request for sanctions against plaintiff under section 128.5, since the complaint was not improperly filed.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 4/27/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

(17) **Tentative Ruling**

Re: ***Crop Production Services, Inc. v. EarthRenew, Inc.***
Court Case No. 09 CECG 02733

Hearing Date: April 28, 2016 (Dept. 501)

Motions: CPS' Motion to Compel: (1) Production of Documents Withheld on the Basis of Privilege and Work Product Claims and (2) Production of a Further Privilege Log
CPS' Motion for Summary Judgment/Summary Adjudication
CPS' Renewed Motion to Dismiss for Failure to Bring to Trial within Five Years
CPS' Motion to Compel Documents Based on ERI's Second Privilege Log
CPS' Motion for Relief Based on ERI's Discovery Violations

Tentative Ruling:

To reschedule CPS' Motion to Compel: (1) Production of Documents Withheld on the Basis of Privilege and Work Product Claims and (2) Production of a Further Privilege Log, currently set for April 28, 2016, to May 5, 2016. To reschedule CPS' Motion for Summary Judgment/Summary Adjudication, currently set for May 5, 2016, to June 16, 2016. To reschedule CPS' Renewed Motion to Dismiss for Failure to Bring to Trial within Five Years, currently set for May 12, 2015, to May 19, 2016. CPS' Motion to Compel Documents Based on ERI's Second Privilege Log, currently set for June 2, 2016, and CPS' Motion for Relief Based on ERI's Discovery Violations, currently set for June 8, 2016, will remain as currently set. All motions will be heard at 3:30 p.m. in Department 501.

Explanation:

Given the demands of the Court's calendar, the voluminous nature of the pleadings filed by the parties, and substantive justice, the court must reschedule the parties' law and motion filings.

If any of the rescheduled dates are not suitable, counsel will confer regarding alternative dates and the court will attempt to accommodate counsel's schedules.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 4/27/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

(2)

Tentative Ruling

Re: ***Spencer v. Bright beginnings et al.***
Superior Court Case No. 14CECG02867

Hearing Date: April 28, 2016 (Dept. 502)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/25/16 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Quality Spruce Properties, LLC v. Sierra Community Center***
Court Case No. 15CECG01387

Hearing Date: **April 28, 2016 (Dept. 502)**

Motion: Defendant's Demurrer to First Amended Complaint

Tentative Ruling:

To sustain with leave to amend. Plaintiff is granted 30 days' leave to amend during which time it must meet and confer concerning the amended complaint before a Second Amended Complaint is filed. (Code Civ. Proc., § 430.41, subd. (c).) The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the second amended complaint are to be set in **boldface** type.

Explanation:

The Declaration of David Weiland establishes that both parties complied with the meet and confer requirements of Code of Civil Procedure section 430.41.

The specific performance cause of action is subject to demurrer. First, as alleged, the sales contract is not specifically enforceable as to the order sought by plaintiff (that defendant be ordered to sign a cross-easement agreement covering ingress, egress, drainage and parking calling for no change in the current physical configuration or current use of the disputed parking area). Specific performance is an equitable remedy; the cause of action itself is for breach of contract. (See *Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal.App.3d 571, 575.) The required elements for pleading a cause of action for breach of contract that will be specifically enforceable are: 1) a specifically enforceable contract which is sufficiently certain in its terms; 2) adequate consideration, and a just and reasonable contract; 3) plaintiff's performance, tender, or excuse from nonperformance; 4) the defendant's breach; and 5) inadequacy of the remedy at law. (Witkin, Cal. Proc. 5th (2008) Plead, § 785.)

While in general an easement agreement can be enforced through specific performance (see Civ. Code § 845), plaintiff has alleged there were no express easement agreements entered into between the parties." (FAC, p. 4:6.) Nor does plaintiff allege (or show by attaching the sales contract to the complaint) that the sales contract had a term requiring the parties to enter into the cross-easement agreement plaintiff wants defendant to be ordered to sign. Thus, plaintiff did not allege a term *of that contract* which is subject to specific performance. Instead, plaintiff alleges specific performance of the sales contract is required on the strength of alleging that the recorded Covenants "are part and parcel of the contract between the parties." However, this is a conclusion of law, which is not taken as true on demurrer. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966—on demurrer the court does not "assume the truth of contentions, deductions, or conclusions of fact or law.") Plaintiff cited no

authority supporting this contention. The benefits and burdens of covenants that run with the land "pass by implication of law and not under principles of contract." (12 Witkin, Summary 10th (2005) Real Prop, § 433, p. 505, citing to Civ. Code § 1460 and *B.C.E. Development, Inc. v. Smith* (1989) 215 Cal.App.3d 1142, 1146.) It does not appear that simply because the recorded Covenant at issue here runs with the land, it was "part of the purchase agreement," as plaintiff argues.

In its argument plaintiff relies solely on Government Code section 65871 as authority. This and related statutory and case law clearly indicate that plaintiff may maintain an action to enforce covenants contained in the recorded Covenant. But that cannot be done by way of an action for specific performance of the sales contract which did not contain any term regarding easements, or reference to the recorded Covenant. The demurrer is therefore sustained.

Leave to amend is granted. Defendant's argument that it is not bound by the recorded Covenant is rejected. Government Code section 65871 provides that in addition to other methods of creating an easement, an easement by a land owner in favor of a city or county may be created by a recorded covenant of easement. (*Id.*, subd. (a).) This requires that at the time of recording such a covenant, the real property benefitted or burdened by the covenant shall be in common ownership. (*Id.,* subd. (b).) In this case, the subject real property was all owned by Mr. Richter, so this requirement is met. This statute provides that the covenant is effective when recorded, and "shall act as an easement pursuant to Chapter 3 (commencing with Section 801) of Title 2 of Part 2 of Division 2 of the Civil Code," and that Civil Code 1104 is also applicable to any conveyance of the affected real property. The covenant may be enforced by the successors in interest to the benefitted property. (Gov. Code § 65871, subd. (d).)

Therefore, it appears both plaintiff and defendant are bound by (and may seek to enforce) whatever covenants may be implicated in the recorded Covenant. Plaintiff may credibly allege that the Covenant encompasses parking within the agreements concerning "vehicular access," and "ingress and egress," as Fresno Municipal Codes concerning parking were expressly referenced in both the introductory section and Paragraphs 1 and 2 (as well as a more general reference to that Code in Paragraph 3). On general demurrer, the court must regard the complaint as admitting "not only the contents of the instrument, but also any pleaded meaning to which the instrument is reasonably susceptible." (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239.)

Civil Code section 809 grants broad authority for the owner of any estate in a dominant tenement (as plaintiff in this action claims to be) to maintain an action for the enforcement of an easement attached to that tenement. However, while pursuant to Government Code section 65871, the covenant "shall act as an easement," it does not appear that the specific performance remedy is available, as that is codified at Civil Code section 845, and by its express terms Government Code section 65871 incorporates only Civil Code sections 801-813 ("Chapter 3…of Title 2 of Part 2 of Division 2 of the Civil Code").

However, it appears plaintiff is able to allege a cause of action for declaratory relief as a way to determine the rights and responsibilities of the parties in relation to the recorded Covenant. (Code Civ. Proc. § 1060. See *Hess v. Country Club Park* (1931) 213 Cal. 613, 614—use of declaratory relief statute to determine validity and binding effect of equitable servitude. See also *Marden v. Bailard* (1954) 124 Cal.App.2d 458, 464—cause of action for declaratory relief stated regarding rights under grant deed, and the effect of building restrictions.) To allege such a cause of action, plaintiff need only allege a proper subject of declaratory relief within the scope of Code of Civil Procedure section 1060 and an actual controversy involving justiciable questions relating to the rights or obligations of a party. (*Hess v. Country Club Park, supra*; *City of Tiburon v. Northwestern Pac. R. Co.* (1970) 4 Cal.App.3d 160, 170.)

The facts implicate the viability of an action for implied easement, which is codified in Civil Code section 1104 (which statute is expressly made applicable by Gov. Code § 65871, *supra*). (See *Fischer v. Hendler* (1942) 49 Cal.App.2d 319, 322—common law rule of implied easement is embodied in Civ. Code §1104.) In the case of *Muzzi v. Bel Air Mart* (2009) 171 Cal.App.4th 456, plaintiff sought to establish an implied easement by bringing an action for declaratory relief. (*Id.* at pp. 458, 467.) An implied easement (of either reservation or grant) will be implied when, at the time the property was conveyed, the following conditions exist: 1) the owner of property conveys a portion of that property to another; 2) the owner made an existing use of the property, the nature of which indicates the parties must have intended or believed that this use would continue; i.e., that the existing use was either known to the party sought to be bound (grantor as to an easement of grant; grantee as to an easement of reservation), or was so obviously and apparently permanent that the parties should have known of the use; and 3) the easement is reasonably necessary to the use and benefit of the party seeking to enforce the implied easement (grantor as to an easement of reservation; grantee as to an easement of grant). (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406.)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/27/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 503

(28) **Tentative Ruling**

Re: ***A.U. v. Blancas, et al.***

Case No. 15CECG02240

Hearing Date: April 28, 2016 (Dept. 503)

Motion: By Defendant Monson-Sultana School District to Deem Facts Admitted and for Sanctions.

Tentative Ruling:

To grant the motion for deemed admissions.

To award sanctions in the amount of $413.00 payable to Defendant's counsel of record in this matter. Sanctions shall be paid within 30 days of notice of this order.

Explanation:

[The Court notes that there is no opposition or reply brief on file, though Defendant has filed a "Notice of Non-Opposition."]

When a party has not responded to Requests for Admissions, a court "shall" grant the motion for deemed admissions "unless it finds that the party to whom the requests for admissions have been directed has served, before the hearing on the motion, a proposed response… in substantial compliance with Section 2033.220." (CCP §2033.280, subd.(c).) (Section 2033.220 generally governs the form and format of responses to requests for admissions.)

Set One of the Requests for Admissions appears to have been properly served on February 9, 2016. The proof of service shows that the Requests were served on counsel for plaintiff at the name and address listed on Plaintiff's complaint. The time for responding has long since passed.

As of today's date, there does not appear to have been a service of the response in compliance with Section 2033.220.

Therefore, the motion for deemed admissions is granted.

Sanctions

Code of Civil Procedure Section 2033.290, subdivision (d) states that "[i]t is mandatory that the court impose a monetary sanction . . . on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion."

Defendant seeks sanctions in the amount of $836.00 based on two hours for preparing the motion and the meet and confer attempt and another two hours in preparing an opposition and drafting a reply. Further, Defendant seeks an hour for attending the hearing on the motion. Since there is no opposition, and the granting of this motion is summary in nature, the Court reduces the award sought. Therefore, the court awards $413.00 in sanctions to be paid by counsel for Plaintiff.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 4/27/16 .
(Judge's initials) (Date)